

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED
IN CLERKS OFFICE
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BECTON, DICKINSON AND COMPANY

Plaintiff,

vs.

THERASENSE INC.,

Defendant.

CIVIL ACTION NO. 04-10574 (JLT)

U.S. DISTRICT COURT
DISTRICT OF MASS.

**DEFENDANT THERASENSE, INC.'S MOTION TO DISMISS, STAY OR TRANSFER
ACTION PURSUANT TO 28 U.S.C. § 2201(a) AND 1404(a)**

Defendant TheraSense, Inc. ("TheraSense") hereby moves to dismiss the instant action, or, in the alternative, to stay or transfer it to the Northern District of California. This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(1), 28 U.S.C. § 2201(a) and 28 U.S.C. § 1404(a).

This Motion is based on the grounds that (1) there was no justiciable case or controversy between the parties at the time Becton Dickinson and Company ("BD") filed the present action, and thus, the Court lacks subject matter jurisdiction over this action; (2) even assuming that there was a justiciable case or controversy, the Court should decline to exercise jurisdiction over BD's declaratory relief claims under 28 U.S.C. § 2201(a), because BD prematurely filed this action during the pendency of licensing negotiations between the parties, thus foreclosing extra-judicial resolution of the parties' dispute and seeking to deprive TheraSense, the owner of the patents in suit, of its preferred choice of forum for BD's acts of infringement; and (3) even were the Court to decline to dismiss this action on either of the preceding two grounds, the factors relevant to determining the proper forum for this action -- including the convenience of the parties and witnesses, and the interest of the respective forums in the underlying dispute -- favor a California forum, and thus the matter should be transferred to the Northern District of California pursuant to

28 U.S.C. § 1404(a).

This Motion is based on this Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Ted Dane and Carl Silverman, the Complaint, and such additional authorities and arguments as may be presented in reply and at or before the hearing on the present motion.

WHEREFORE, TheraSense respectfully moves to dismiss the instant action, or, in the alternative, to stay or transfer it to the Northern District of California. This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(1), 28 U.S.C. § 2201(a) and 28 U.S.C. § 1404(a).

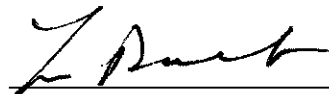
REQUEST FOR ORAL ARGUMENT

TheraSense requests that the Court hear oral argument on the present motion.

Respectfully submitted,

THERASENSE, INC.

By its attorneys,



Ted Dane (*admitted pro hac vice*)

Jeffrey I. Weinberger (*admitted pro hac vice*)

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Dated: June, 1 2004

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I, Matthew L. Mitchell, hereby certify that counsel for TheraSense has contacted Plaintiff's counsel in an effort to resolve or narrow the issues presented in this motion.

Matthew L. Mitchell

Matthew L. Mitchell

CERTIFICATE OF SERVICE

I, Matthew L. Mitchell, hereby certify that a true copy of the foregoing was served on Plaintiff's counsel by first-class mail, postage prepaid, on or about June 1, 2004.

Matthew L. Mitchell

Matthew L. Mitchell